Menteri Dalam Negeri, Malaysia & Anor v Seyed Ramin Paknejad

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–93–04 OF 2016 (W)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), AHMAD MAAROP, ZAHARAH IBRAHIM FCJJ AND ABANG ISKANDAR JCA
20 MARCH 2017

Criminal Procedure — Extradition — Committal, order for — Sessions court granted order committing respondent to prison pending order to extradite him to Thailand — Respondent successfully applied to High Court for writ of habeas corpus ordering his release from detention — Whether High Court right to find affidavits filed by Thai authorities showed compelling evidence respondent would be prosecuted for offences other than those for which his extradition was requested — Whether there was likelihood rule of speciality would be breached — Whether rule on dual criminality was satisfied — Extradition Act 1992 s 6

A criminal court in Thailand had issued a warrant for the respondent's arrest after he had 'jumped bail' and failed to turn up in court to stand trial on a charge of illegal possession of heroin and nine charges of forgery/counterfeiting of documents. On discovering that the respondent was in Malaysia, the Thai Government requested the Malaysian Government to secure the respondent's arrest pending his extradition to Thailand under the Extradition Treaty between the two countries. The respondent was arrested pursuant to a warrant issued by a magistrate under s 13 of the Extradition Act 1992 ('the EA') and the case was transferred to the sessions court which, on the application of the public prosecutor, committed the respondent to prison pending an order from the first appellant for his extradition. The respondent successfully applied to the High Court for a writ of habeas corpus ordering his release from detention. The High Court held that the affidavit evidence showed that the respondent was liable to be prosecuted for additional offences other than the ones for which his extradition was requested and that no undertaking had been given by the Thai Government that he would only be prosecuted for those charges for which his extradition was requested. In the instant appeal, the appellants argued that the High Court's decision was wrong as the extradition request was based only on the ten charges the respondent faced in Thailand and that none of the statements made in the affidavits of Prasit Bourruk (an assistant public prosecutor in Thailand), Colonel Songsak Raksasakul (head of a special case inquiry team investigating the respondent) and Thinawudh Silapat (a police officer) could be taken to be 'compelling evidence' that Thailand would prosecute the respondent for offences other than those for

which his extradition was requested. The appellants further argued that the absence of an undertaking from the Thai government did not breach the rule of specialty under the terms of the Extradition (Thailand) Order 1992 ('the Thailand Order') and s 2(4) of the EA. The respondent, however, submitted that the order for his committal to prison should not have been made by the sessions court because the affidavits of the Thai officers did provide compelling evidence that the Thai authorities would prosecute him for offences other than those for which his extradition was requested. The respondent also contended that the sessions court's committal order offended the rule of dual criminality because the offences for which his extradition was requested were not recognised as offences in Malaysia.

Held, allowing the appeal:

(1) The affidavits of the three Thai officers could not be said to be 'compelling evidence' that the Thai authorities would act in breach of the rule of specialty as specified in the Treaty embodied in the Thailand Order. The issue of the Thai Government providing an undertaking therefore did not arise. A close reading of the affidavits showed that Mr Prasit and Colonel Songsak were merely stating that the additional charges were not yet notified to the respondent as he had jumped bail and that he would, when arrested, be notified of the additional charges and be prosecuted. There was nothing in those statements to indicate that the proposed notification and prosecution of the additional offences would be proceeded with after the respondent's extradition and in breach of the Treaty. There was also no evidence before the courts below that Thailand, with whom Malaysia has had an extradition arrangement since 1911, had in the past acted in breach of the rule of specialty (see paras 44–45 & 51–53).

(2) The provisions of s 6 of the Extradition Act on dual criminality had been satisfied. Each of the nine counterfeiting/forgery charges against the respondent were offences under s 264 of the Thai Penal Code carrying a jail term not exceeding three years or a fine, or both, upon conviction. The equivalent law in Malaysia for those offences was found in ss 463, 464, 465 and 468 of the Penal Code. Since the purpose of the counterfeiting was for cheating, the applicable provision was s 468 which carried a jail term of up to seven years. Forgery was also in the list of extradition offences in article II of the Treaty embodied in the Thailand Order. As for the charge of illegal possession of heroin, the punishment under Thai law was a jail term of between one and ten years. The equivalent provision in Malaysia was contained in Part IV of the Dangerous Drugs Act 1952, specifically s 11(1) and s 12(2) and (3). The punishment for illegal possession of heroin in Malaysia was a jail term not exceeding five years or a fine. While an extradition order could certainly be made based on the nine forgery/counterfeiting charges, the discretion

A lay with the Malaysian Government as to whether to grant extradition for the heroin offence which was not in the list of extradition offences in article II of the Treaty in the Thailand Order. However, the fact that the extradition request was being processed by the Malaysian Government in accordance with the Thailand Order and the EA was prima facie evidence B of the government's satisfaction that the grant could be made (see paras 57–58, 63–66, 68–71, 74 & 76–77).

[Bahasa Malaysia summary

Mahkamah jenayah di Thailand telah mengeluarkan waran ke atas C penangkapan responden selepas dia 'jumped bail' dan gagal untuk hadir di mahkamah untuk perbicaraan ke atas tuduhan milikan heroin secara haram dan sembilan tuduhan pemalsuan/pemalsuan dokumen. Atas dapatan bahawa responden berada di Malaysia, Kerajaan Thai memohon Kerajaan Malaysia untuk memastikan penangkapan responden sementara menunggu D ekstradisinya ke Thailand di bawah Perjanjian Ekstradisi di antara kedua-dua negeri. Responden ditangkap berikutan waran yang dikeluarkan oleh majistret di bawah s 13 Akta Ekstradisi 1992 ('AE') dan kes tersebut dipindahkan ke mahkamah sesyen yang mana, atas permohonan pihak pendakwaan, memenjarakan responden sementara menunggu perintah daripada perayu E pertama untuk ekstradisinya. Responden berjaya memohon kepada Mahkamah Tinggi untuk writ habeas corpus memerintah pelepasannya daripada tahanan. Mahkamah Tinggi memutuskan bahawa keterangan afidavit menunjukkan bahawa responden bertanggungjawab untuk didakwa bagi kesalahan tambahan selain daripada kesalahannya yang mana ekstradisinya F dipohon dan bahawa tiada akujanji telah diberikan oleh kerajaan Thai bahawa dia akan hanya didakwa untuk tuduhan-tuduhan tersebut yang mana ekstradisinya dipohon. Dalam rayuan ini, perayu-perayu berhujah bahawa keputusan Mahkamah Tinggi adalah salah kerana permohonan ekstradisi tersebut adalah berdasarkan hanya ke atas ke sepuluh tuduhan yang dihadapi G oleh responden di Thailand dan tidak satu pun daripada pernyataan-pernyataan yang dibuat di dalam afidavit-afidavit Prasit Bourruk (penolong pendakwa raya di Thailand), Kolonel Songsak Raksasakul (ketua kes khas pasukan siasatan yang menyiasat responden) dan Thinawudh Silapat (pegawai polis) boleh diambil sebagai 'compelling evidence' bahawa Thailand H akan mendakwa responden bagi kesalahan selain daripada kesalahan-kesalahan yang mana ekstradisinya dipohon. Perayu-perayu selanjutnya berhujah bahawa ketiadaan akujanji daripada Kerajaan Thai tidak melanggar peraturan khusus di bawah syarat-syarat Extradition (Thailand) Order 1992 ('Perintah Thailand') dan s 2(4) AE. Responden, walau bagaimanapun berhujah bahawa I perintah untuk komitalnya ke penjara tidak patut dibuat oleh mahkamah sesyen kerana afidavit-afidavit pegawai-pegawai Thai tersebut tidak memperuntukkan keterangan kuat bahawa pihak berkuasa Thai akan mendakwanya bagi kesalahan-kesalahan selain daripada kesalahan yang mana ekstradisinya dipohon. Responden juga berhujah bahawa perintah komital

mahkamah sesyen menyinggung peraturan jenayah dua hala kerana kesalahan-kesalahan yang mana ekstradisinya dipohon tidak diterima sebagai kesalahan-kesalahan di Malaysia.

Diputuskan, membenarkan rayuan:

(1) Afidavit-afidavit ketiga-tiga pegawai Thai tersebut tidak boleh dikatakan sebagai 'compelling evidence' bahawa pihak berkuasa Thai akan bertindak melanggar peraturan khusus seperti yang dinayatkan di dalam Perjanjian yang ditetapkan di dalam Perintah Thailand. Isu Kerajaan Thai memperuntukkan akujanji dengan itu tidak berbangkit. Pembacaan teliti afidavit-afidavit tersebut menunjukkan bahawa Mr Prasit dan Kolonel Songsak hanya menyatakan bahawa tuduhan tambahan tidak lagi diberitahu kepada responden kerana dia telah melarikan diri daripada jaminan dan dia akan, apabila ditangkap, akan diberitahu mengenai tuduhan tambahan dan didakwa. Tidak terdapat apa-apa di dalam pernyataan tersebut untuk menunjukkan bahawa pemberitahuan yang dicadangkan tersebut dan pendakwaan kesalahan-kesalahan tambahan akan diteruskan selepas ekstradisi responden dan pelanggaran Perjanjian. Juga tidak ada keterangan di hadapan mahkamah sesyen bahawa Thailand, negeri yang mana Malaysia mempunyai perjanjian ekstradisi semenjak tahun 1911, telah pada masa lampau bertindak melanggar peraturan khusus tersebut (lihat perenggan 44–45 & 51–53).

(2) Peruntukan s 6 AE atas jenayah dua hala telah dipenuhi. Setiap enam tuduhan pemalsuan terhadap responden adalah kesalahan di bawah s 264 Thai Penal Code membawa kepada tempoh penjara tidak lebih tiga tahun atau denda, atau kedua-dua, atas sabitan. Undang-undang bersamaan di Malaysia bagi kesalahan-kesalahan didapati di dalam ss 463, 464, 465 dan 468 Kanun Keseksaan. Memandangkan tujuan pemalsuan untuk penipuan, peruntukan yang yang beraplikasi adalah s 468 yang mana membawa tempoh penjara sehingga tujuh tahun. Pemalsuan juga adalah di dalam senarai kesalahan ekstradisi di dalam artikel II Perjanjian yang ditetapkan di dalam Perintah Thailand. Berkenaan tuduhan milikan haram heroin, hukuman di bawah undang-undang Thai adalah tempoh penjara di antara satu dan sepuluh tahun. Peruntukan bersamaan di Malaysia terdapat di dalam Bahagian IV Akta Dadah Berbahaya 1952, terutamanya s 11(1) dan s 12(2) dan (3). Hukuman untuk milikan haram heroin di Malaysia adalah tempoh penjara tidak melebihi lima tahun atau denda. Sementara perintah ekstradisi pasti dapat dibuat berdasarkan atas Sembilan tuduhan pemalsuan, budi bicara terletak ke atas Kerajaan Malaysia sama ada untuk membenarkan ekstradisi bagi kesalahan heroin yang mana bukan di dalam senarai kesalahan ekstradisi di dalam artikel II Perjanjian di dalam Perintah Thailand. Walau bagaimanapun, fakta bahawa

permohonan ekstradisi diproses oleh Kerajaan Malaysia mengikut Perintah Thailand dan AE adalah keterangan prima facie penyelesaian kerajaan bahawa kebenaran tersebut boleh dibuat (lihat perenggan 57–58, 63–66, 68–71, 74 & 76–77).]

Notes

For cases on committal, order for extradition, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2451–2455.

Cases referred to

Brodziak v Circuit Court in Warsaw, Poland and other appeals [2013] EWHC 3394, QBD (refd)

Creole (1841) (refd)

Edutanu v Isasi Court of Law (Romania) [2016] EWHC 124 (Admin), QBD (refd)

Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid and another; Practice Note [2007] 1 WLR 768; [2006] 4 All ER 435, QBD (refd)

Jaso v Central Criminal Court No 2 Madrid sub nom Ruiz v Central Court of Criminal Proceedings No 5 of the National Court, Madrid [2008] 1 WLR 2798, QBD (refd)

Shankaran v India and another [2014] EWHC 957 (Admin), QBD (refd)

Legislation referred to

Commonwealth Fugitive Criminals Act 1967

Dangerous Drugs Act 1952 ss 11(1), 12(2), (3), First Schedule, Parts III, IV, V

Extradition Act 1992 ss 2, 2(4), 6, 8(e), 10(3), 13(1), 19(4), (5)

Extradition Ordinance 1958

Extradition (Thailand) Order 1960 [TH]

Extradition (Thailand) Order 1992 [TH]

Narcotics Act BE 2522 (1979) [TH] ss 7, 15, 67

Penal Code ss 463, 464, 465, 468

Thai Penal Code [TH] ss 91, 264

Appeal from: Criminal Application No 44–17–01 of 2014 (High Court, Kuala Lumpur)

Awang Armadajaya bin Awang Mahmud (Nadia Hanim bt Mohd Tajuddin and Faizul Aswad Masri with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Muhammad Shafee Abdullah (Sarah Abishegam with him) (Shafee & Co) for the respondent.

Zaharah Ibrahim FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the High Court which allowed the respondent's application for a writ of habeas corpus to be issued for his release from detention pursuant to the warrant of committal issued by the sessions court pending the order for extradition by the first appellant.

[2] We heard the appeal on 26 April 2016 and allowed the appeal. We now give our reasons for that decision.

BACKGROUND FACTS

[3] The facts of this case are as set out below.

[4] A warrant of arrest dated 27 July 2012 was issued by the Bangkok Criminal Court against the respondent.

[5] Subsequently, the Government of Thailand made a request to the Government of Malaysia via a letter of request dated 21 August 2013 for a temporary warrant of arrest to be issued against the respondent. The request was made under the Extradition Treaty concluded between Great Britain and Siam on 4 March 1911 and made applicable to Malaya (and later Malaysia) and the government of the Kingdom of Thailand by way of diplomatic notes dated 17 October 1959 and recognised through the Extradition (Thailand) Order 1992 ('the Thailand Order') made under the Extradition Act 1992 ('the Extradition Act').

[6] On 27 August 2013 the Kuala Lumpur Magistrates' Court issued a provisional warrant of arrest against the respondent under sub-s 13(1) of the Extradition Act. The respondent was arrested. On 25 March 2013, an order was made for the transfer of the the case to the sessions court and the respondent was ordered to be remanded until he was brought before the sessions court.

[7] On 12 November 2013 the public prosecutor made an application to have the respondent committed to prison pending the order of the Minister for Home Affairs ('the first appellant') to surrender the respondent to the Government of Thailand. The warrant of committal was issued by the sessions court on 10 January 2014 ('warrant of committal').

[8] The respondent then filed an application for a writ of habeas corpus at the Kuala Lumpur High Court but the application was dismissed on 26 March 2014.

[9] An appeal was filed by the respondent to the Federal Court. On 26 August 2014 the Federal Court allowed the appeal and ordered the case to be re-heard before another High Court judge as the decision made on 26 March 2014 was made without the benefit of the grounds of judgment of the sessions court judge who issued the warrant of committal.

[10] The case was reheard before another High Court judge.

[11] References in this judgment to the proceedings in the High Court and the decision and order of the High Court are references to the proceedings before the second High Court judge and to his decision and order.

AT THE HIGH COURT

[12] According to the learned High Court judge, the four grounds raised before him by counsel for the respondent were:

(a) issue of dual criminality;

(b) issue of rule of speciality;

(c) discrepancy in the weight of the drugs; and

(d) failure to prove a prima facie case as required by sub-s 19(4) of the Extradition Act.

[13] In his grounds of judgment, the learned High Court judge said:

> Meneliti alasan penghakiman Tuan HMS, saya berpuas hati atas alasan yang diberikan untuk isu-isu lain namun saya berkeputusan dan tidak bersetuju atas isu 3 dan 4 dan tidak dapat menerima alasan oleh Tuan HMS atas isu 'rule of speciality' dan 'dual criminality' ini.

[14] The learned High Court judge further said:

> Mahkamah ini melihat pada satu isu sahaja iaitu 'rule of speciality' dan 'dual criminality' selain dari tiadanya undertaking yang pihak kerajaan Thailand yang mereka akan hanya menuduh pemohon atas Bhg VI s 8(e) Akta. Mahkamah ini merujuk kepada affidavit DPP Thailand ... menyatakan bahawa 'If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted ...'.

[15] The learned High Court judge found that the affidavits indicated that the respondent would be prosecuted for additional offences other than those in

the charges for which extradition was requested, and there was no undertaking by the Government of Thailand that the respondent would face only those charges. His Lordship was of the view that based on the treaty, the nature and consequences of the charges that the respondent would face must be certain and proved at the prima facie stage under sub-s 19(5) of the Extradition Act before a committal order could be made. Otherwise, the sessions court judge must release the respondent.

[16] On 29 March 2016 the High Court judge allowed the application for a writ of habeas corpus and ordered that the respondent be released from detention.

[17] The appellants appealed to this court against the order.

AT THE FEDERAL COURT SUBMISSIONS BY THE APPELLANTS

On the rule of speciality

[18] Before us, learned senior federal counsel Awang Armadajaya submitted that the rule of speciality, which requires that the respondent only be tried for the offences for which his extradition was granted, was complied with in this case as the documents presented by the Thai authorities showed that the extradition request was based on the ten charges which the respondent was facing in Thailand. Those charges were for the offences of being in illegal possession of narcotics and for document forgery.

[19] The respondent was going to be returned to Thailand to stand trial only for the offences being considered by Malaysia in accordance with the extradition request. Any statement made in the afidavit of Mr Prasit Bourruk (an assistant public prosecutor of Thailand) on other offences cannot be taken as 'compelling evidence' that Thailand would prosecute him for those other offences.

[20] Learned senior federal counsel submitted that the absence of an undertaking by the Thai Government that the respondent would not be detained or prosecuted in Thailand for any offence committed prior to his return pursuant to his extradition except for the offences for which the order for extradition is made is not a breach of the rule of speciality in view of the terms of the Thailand Order and the provisions of s 2(4) of the Extradition Act.

[21] It was also submitted for the appellants that should the Thai authorities prosecute the respondent for offences other than those for which he was extradited to Thailand, it would be a ground for a diplomatic protest by the Malaysian Government for a possible breach of international treaty.

[22] On the part of the respondent, should he be prosecuted for offences committed in Thailand prior to his extradition other than those for which he was extradited, he would be entitled to invoke the rule of speciality as a remedy or defence.

[23] Learned senior federal counsel further submitted that in any case the rule of speciality does not bar totally the prosecution of a person for offences other than those for which he is extradited. He can still be prosecuted for those other offences if he has been restored or has had an opportunity to return to the state by which he was surrendered to the requesting state.

SUBMISSIONS BY THE RESPONDENT

On the rule of speciality

[24] Learned counsel for the respondent submitted that an arrangement to comply with the rule of speciality is not effective if there is compelling evidence that the requesting state is likely to breach the rule.

[25] In the case before us, learned counsel for the respondent submitted that the affidavit of Mr Prasit Bourruk as well as the affidavit of Colonel Songsak Raksasakul provided compelling evidence of the intention of the Thai authorities to act in breach of the rule of speciality.

[26] The respondent submitted that from the evidence of Police Captain Thinawudh Silapat, the search warrant obtained against the respondent showed that the investigation against the respondent was primarily for passport forgery and not the offences for which he was charged.

[27] It was also the respondent's contention that due to the provisions of s 10(3) of the Extradition Act, the Malaysian authorities are not entitled to give consent for the prosecution of a person for additional offences not being those for which he was extradited.

On the rule of dual criminality

[28] The respondent further submitted that any order for the committal of the respondent and his extradition to Thailand would also offend the rule of dual criminality as the offences in the charges upon which the extradition request was made are not offences which correspond to offences in Malaysia.

ANALYSIS

[29] The issues for determination in this appeal are whether the committal order by the sessions court pending the extradition order by the minister offends the rule of speciality and the rule of dual criminality.

Extradition arrangement between Malaysia and Thailand

[30] The extradition of fugitive offenders must be as provided for by the legislature. In the case of the *Creole* (1841) referred to in *Jones and Doobay on Extradition and Mutual Assistance* (3rd Ed) at p 10, the House of Lords held the unanimous view that extradition without an act of parliament was unlawful.

[31] In Malaysia, the law in force in relation to the extradition of fugitive offenders is as contained in the Extradition Act which replaces the Extradition Ordinance 1958 and the Commonwealth Fugitive Criminals Act 1967.

[32] Section 2 of the Extradition Act provides that 'Where a binding arrangement has been entered into between Malaysia and any country for the extradition of fugitive criminals, the Minister may, by order to be published in the *gazette* reciting or embodying the terms of such arrangement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order'.

[33] The Thailand Order, embodying the terms of the arrangement between Malaysia and Thailand, being the treaty between the Federation of Malaya and the Kingdom of Thailand which came into being pursuant to the exchange of notes dated 27 October 1959, for the mutual surrender of fugitive criminals in accordance with the provisions of the treaty dated 4 March 1911 concluded between the King of Thailand and the King of the United Kingdom, was made by the Minister under s 2 of the Extradition Act on 10 July 1992. The Thailand Order was published in the *gazette* as PU(A) 269/1992. It was deemed to have come into force on 21 February 1992, which was also the date of coming into operation of the Extradition Act.

[34] By virtue of sub-s 2(4) of the Extradition Act, the Thailand Order is 'conclusive evidence' that the arrangement referred to in the Thailand Order 'complies with the provisions of this Act', and that the Extradition Act applies in the case of Thailand, and 'the validity of such order shall not be questioned in any legal proceedings whatsoever'.

Rule of speciality

[35] The rule of speciality is that rule in extradition law that prohibits the state requesting the extradition of a person from prosecuting or punishing the extradited person for offences other than those for which the request for his extradition was based and for which he was extradited, subject to exceptions as provided for in the applicable extradition law.

[36] That rule is embodied in s 8(e) of the Extradition Act which provides as follows:

> 8 A fugitive criminal shall not be surrendered to a country seeking his return —
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> ...
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> *(e)* unless provision is made by the law of that country, *or in the extradition arrangement with that country,* that a fugitive criminal who has not had a reasonable opportunity of leaving that country *shall not be detained or tried in that country for any offence committed prior to his return, other than the extradition offence proved by the facts on which his surrender or return is based* or any lesser offence proved by the facts on which the return was grounded *or any lesser offence proved by the facts on which the return was grounded* or
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> ... (Emphasis added.)

[37] Article VI of the Treaty embodied in the Thailand Order states, in para 2, that:

> VI. A person surrendered can *in no case be detained or tried* in the State to which the surrender has been made, *for any other crime or on account of any other matters than those for which the extradition shall have taken place,* until he has been restored or had an opportunity of returning to the State by which he has been surrendered.
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> This stipulation does not apply to crimes committed after the extradition. (Emphasis added.)

[38] In view of the provisions of s 2 of the Extradition Act and the Thailand Order, there is conclusive evidence that there is in existence with Thailand an extradition agreement that provides for the rule of speciality.

[39] In those circumstances, the provisions of para 8(e) of the Extradition Act have been complied with.

[40] The only issue that needs consideration in relation to the rule of speciality is the respondent's argument that where there is compelling evidence that the respondent would be prosecuted for offences other than those for which his extradition was requested, his extradition should be refused and therefore the order for his committal pending the order for his extradition should not have been made.

[41] According to the respondent, if there is compelling evidence that the requesting state (in this case Thailand) will act in breach of the rule of speciality, an extradition order cannot be granted. Reliance was placed on the following cases:

(a) *Jaso v Central Criminal Court No 2 Madrid sub nom Ruiz v Central Court of Criminal Proceedings No 5 of the National Court, Madrid* [2008] 1 WLR 2798 ('Ruiz');

(b) *Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid and another; Practice Note* [2007] 1 WLR 768; [2006] 4 All ER 435 ('Hilali');

(c) *Shankaran v India and another* [2014] EWHC 957 (Admin) ('Shankaran');

(d) *Brodziak v Circuit Court in Warsaw, Poland and other appeals* [2013] EWHC 3394 ('Brodziak'); and

(e) *Edutanu v Isasi Court of Law (Romania)* [2016] EWHC 124 (Admin) ('Edutanu').

[42] In the case of *Ruiz* referred to by the respondent, the court endorsed the following approach of Scott Baker LJ in the case of *Hilali*:

> It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future.

[43] In the other cases relied upon by the respondent similar views had been expressed. In the cases of *Shankaran, Brodziak,* and *Edutanu,* the courts held that the strong presumption is that the requesting states would act in accordance with their international obligations in respect of the rule of speciality. Hence, compelling evidence is required to displace that presumption.

[44] Malaysia has had an extradition arrangement with Thailand from as long ago as 1911, initially through Great Britain. Upon the enactment of the Extradition Ordinance 1958, the relationship forged by the Treaty between Great Britain and Thailand was reaffirmed by way of an exchange of notes in October 1959 and given legislative effect by the Extradition (Thailand) Order 1960. The arrangement continued without a break with the Thailand Order.

[45] There was no evidence at all before the courts below that Thailand had in the past acted in breach of the rule of speciality.

[46] The respondent relied, inter alia, upon the following statements in the affidavit of Mr Prasit, to show the existence of compelling evidence of the intention to act in breach of the rule of speciality:

> However, for the charges of 'falsifying official documents (imprints of the exit stamp of the immigrations official), counterfeiting passports and having counterfeit passports for distribution, and taking by stealth or receiving property', the alleged offender has not yet been notified by the special case inquiry working group that there are additional charges against him because those criminal acts were found after the alleged offender had jumped bail and the Criminal Court had already issued the warrant of arrest of his alleged offender. *If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted.*
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> ...
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> ... Besides, five confiscated foreign passports which were in possession of the alleged offender are genuine passports but had been reported lost and stolen. The analysis results report revealed that four passports out of the exhibits of five passports confiscated by the officials (the exhibits Nos 4, 5, 6 and 8 in accordance with the list of exhibits attached to the indictment in Black Case No Or 2974/2555 of the Criminal Court) have the imprints of the exit stamp No 5250 of Immigration Bureau at Suvarnabhumi International Airport appearing on them. Having interviewed related witnesses, they consistently asserted that those were forged imprints because the genuine exit stamps No S250 had been suspending from use and storing in the depository of Immigration Bureau since June 20, 2007. Furthermore, several equipment, tools and appliances using for forging passports were found in the room of the alleged offender. All pieces of evidence in the case were sufficient to believe that the alleged offender had committed the aforesaid offences. Therefore, I duly considered and have given opinion to prosecute the alleged offender on the charges of 'having narcotics in schedule 1 (heroin) in possession without permission, falsifying documents (foreign ID cards and driving licenses), counterfeiting passports, falsifying documents (imprints of the exit stamp of the immigration officials), having counterfeit passports for distribution, and taking by stealth or receiving stolen property. (Emphasis added.)

[47] The statements in the affidavit of Colonel Songsak Raksasakul which the respondent said provide compelling evidence of the intention of the Thai authorities to act in breach of the rule of speciality are as follows:

> I, as head of the special case inquiry team designated for this case, has concluded my opinion that it is appropriate to prosecute the alleged offender according to the aforesaid charges. However, for the charges of 'falsifying officials documents (imprints of the exit stamp of the immigration official), counterfeiting passports and having counterfeit passports for distribution, and taking by stealth or receiving stolen property', the alleged offender has not been notified by the special case inquiry working group that there are additional charges against him because those criminal acts are found after the alleged offender had jumped bail during provisional release granted by the Pattaya Provisional Court, and the Criminal

Court had issued the warrant of arrest of this alleged offender later. If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted.

...

... However, although five passports, the exhibits, are genuine, three of them belong to the Government of Italy and the rest belong to the Government of France, their real holders of which reported to their relevant embassies that they were stolen and lost in Thailand. All evidence in the case substantiates the criminal acts of the alleged offender. Therefore, I duly considered and gave opinion that it is deemed appropriate to prosecute the alleged offender on charges of 'having narcotics in schedule 1 (heroin) in possession without permission, falsifying documents (foreign ID cards and driving licenses), counterfeiting passports, falsifying official documents (imprints of the exit stamp of the immigration official), having counterfeit passports for distribution, and taking by stealth or receiving stolen property. (Emphasis added.)

[48] Reliance was also placed on the statements in the affidavit of Police Captain Thinawudth Silapat that the search warrant obtained against the respondent was for passport forgery, and on the captain's detailed account of his investigation which focused on the respondent's alleged role in forging and selling fake or forged passports.

[49] Do those statements constitute compelling evidence that the Thai authorities would act in breach of the rule of speciality?

[50] Mr Prasit's and Colonel Songsak's statements quoted above appear in their accounts of what transpired during investigations, the subsequent raid and confiscation of evidence as well as the respondent's arrest.

[51] A close reading of the affidavits would show that Mr Prasit and Colonel Songsak were merely making the statements that the additional charges were not yet notified to the respondent as he had jumped bail and that he would, when arrested, be notified of the additional charges and be prosecuted. There is nothing in those statements to indicate that the proposed notification and prosecution of the additional offences would be proceeded with *after* the respondent's extradition and in breach of the treaty.

[52] In fact, Mr Prasit stated in his affidavit that *'Once the alleged offender is extradited to Thailand, he will be brought to Criminal Court to begin the proceedings in the case that was prosecuted by me'*. (Emphasis added.) The offences prosecuted by Mr Prasit are, as stated in para 8 of the affidavit 'for the charges of 'having narcotics in schedule 1 (heroin) in possession without permission and falsifying documents'.

[53] The affidavits of the three Thai officers cannot, in our considered view, be said to be 'compelling evidence' that the Thai authorities would act in breach of the rule of speciality as specified in the Treaty embodied in the Thailand Order. The issue of the Thai Government providing an undertaking therefore does not arise.

Rule of dual criminality

[54] Simply put, the rule of dual or double criminality in extradition law is that requirement that to be an extraditable offence the act constituting the offence must be an offence in both the requesting and requested states and must have been committed in the territory of the requesting state.

[55] The rule of dual/double criminality is embodied in s 6 of our Extradition Act, which reads as follows:

> 6(1) A fugitive criminal shall only be returned for an extradition offence.
>
> (2) For the purpose of this Act, an extradition offence is an offence, however described, including fiscal offences —
>
> (a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or *1(2)(b),* with imprisonment for not less than one year or with death; and
>
> (b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:
>
> Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.
>
> (3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

[56] The charges against the respondent according to the case filed in the Criminal Court in Thailand are for possession of heroin and document forgery. The charges are as follows:

> 1.1 On June 8, 2012, in the daytime, the accused dared to possess heroin (5 tubes weighing 0.141 gram), which is a narcotic of Schedule I/Category I in the Narcotics Act B.E. 2522 (1979), the Narcotics Act (No 2) B.E. 2528 (1987), and the Ministry of Public Health's Proclamation (No 135) B.E. 2539 (1996) of the names and types of narcotics prescribing in the Narcotics Act 1979, clause 2, and the List in the Annex attached to such Proclamation of the Ministry of Public Health published in the Government Gazette, and the accused had acknowledged the text of this proclamation. The illegal possession of heroin of the accused was the act violating the laws.

1.2 From the beginning of January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian health card, by using plastic material and writing the text REPLVBBIGA ITALIANA TESSERA SANITARIA, with the code CRDMML81Ll8BII4U, dated 20/10/2020, in the name of DI GRE GORIO BRUNO ALIX, a male gender where the place of birth is France and the date of birth is 26 JUN 1983, with the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.3 From January 2011 to June 8, 2012, in the daytime but unkown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA CARTA D'IDENTITA, in the name of MAIR MICHAEL, 25 AUG 1973 BOLZANO (BZ) 3025 NATALIO ST SETIRO, HANET.DEL 012569, BOLZAND ITALY, NO 325698743, with the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.4 From the beginning of January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, CARTA D'IDENTITA, in the name of DI GREGORIO BRUNO ALIX, 26 JUN 1983, PARAY LE MONIAL (FRA), NO 129058890, with the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.5 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, TESSERA JANITARIA, with the code CRDMML81L18B114U, in the name of MAIR MICHAEL, BOLZAND, with the date of birth 25 AUG 1973, and other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.6 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, CARTA D'IDENTITA, in the name of MAIR MICHAEL, 25 AUG 1973 BOLAND (BZ), No. LK 65SDFG65DF9 RTGS, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

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1.7 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, TESSERA SANITARIA, with the code CRDMHLSILI88114U, in the name of
B
DIGREGORIO BRUNO ALIX, with the date of birth 25 JUN 1983, and other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.8 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all
C
parts of an ID card, by using plactic material and writing the text REPVBBLICA ITALIANA, CARTA D'IDENTITA, in the name DI GREGORIO BRUNO ALEX, No KGRDVG6541740H125, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause
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damage to the others or people.

1.9 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of an ID card by using plastic material and writing the text ITALIAN INTERNATIONAL DRIVING LICENSE, in the name
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of MR ABRIOLA JULIEN, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.10 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all
F
parts of an Italian ID card by using plastic material and writing the text DEUTSCHLAND IDENTIFICATION CARD, No 682473954, in the name of MR MULLER FLORAIN, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause
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damage to the others or people.

[57] A translation in the English language of the relevant Thai law is found in exh 'HA06A' exhibited to the affidavit deposed by Haliza Aini bt Othman, the senior federal counsel handling the matter in the Attorney General's
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Chambers of Malaysia. The offence of counterfeiting a document or part of a document falls within s 264 of the Thai Penal Code. The relevant portion of that section reads as follows:

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> Section 264 Whoever forges a whole or part of a document, adds, removes or falsifies by any means upon a genuine document; affixes with a counterfeit seal; or puts a forged signature to a document in a manner likely to cause damage to any person or the people, where it is committed with intent to cause any other person to believe that it be a genuine document is said to commit the offence of forgery of documents, and shall be liable to imprisonment for not exceeding three years or a fine not exceeding six thousand Baht, or both.

[58] Thus, in this case, for each of the nine forgery/counterfeiting offences with which the respondent has been charged, the punishment is imprisonment not exceeding three years or a fine not exceeding six thousand Baht or both.

[59] By virtue of the provisions of s 91 of the Thai Penal Code, however, the total punishment that can be imposed in cases where the offender commits several distinct and different offences shall not exceed ten years of imprisonment where the heaviest offence is punishable with a maximum punishment not exceeding three years of imprisonment.

[60] With regard to the narcotics offence, the drug which is the subject matter of the charge is heroin. That drug is classified as a category I drug according to s 7 of the Narcotics Act BE 2522 (1979) of Thailand.

[61] Section 15 of the Narcotics Act of Thailand provides that 'No person shall produce, import, export, dispose of or possess narcotics of category I, unless the Minister permits for the necessity of the use for government service'. That section also provides a presumption that the drug is for disposal if the drug is:

(1) Dextrolyzer of LSD ...

(2) Amphetamine or a derivative of amphetamine ...

(3) Narcotics of category I unless (1) and (2) is of the quantity computed to be of pure substances of three grams or more.

[62] Section 67 of the Narcotics Act provides that any person 'who possesses narcotics of category I without permission and in quantity computed to be pure substances, or in number of used dosage, or in net weight, that does not reach the quantity prescribed in section 15 para three, shall be liable to imprisonment for a term of one year to ten years, or to a fine of twenty thousand to two hundred thousand baht, or to both'.

[63] As the drug which is the subject matter of the narcotics charge against the respondent is heroin (a narcotic in Category I) and the weight of the drug in question is 0.141g (which is less than three grams) the respondent, if convicted of that charge, is liable to an imprisonment term of between one to ten years.

[64] For the offences in the nine charges which relate to the counterfeiting of documents, the equivalent law in Malaysia is in ss 463, 464, 465 and 468 of the Penal Code, the relevant parts of which are as follows:

463 Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or

A to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

464 A person is said to make a false document —

B (a) who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document was made, signed, sealed or executed by, or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed;

C ...

465 Whoever commits forgery shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

D ...

468 Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

E **[65]** Under Malaysian law, even for simple forgery, the offence is punishable with imprisonment which may extend to three years. However, in the case of the offences in the nine charges against the respondent for counterfeiting/forgery, it is clear that what was intended to be proved was that the counterfeited documents would be used for cheating. In those F circumstances s 468 is the applicable provision and thus the punishment is imprisonment which may extend to seven years.

[66] The offence of forgery is clearly listed as item 6 in the list of offences in article II of the Treaty embodied in the Thailand Act.

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[67] In our considered view therefore, the rule of dual criminality has not been breached in relation to the nine charges for the counterfeiting of documents.

H

[68] In relation to the charge for possession of narcotics (heroin), the equivalent provision in Malaysian law is contained in Part IV of the Dangerous Drugs Act 1952, specifically s 11(1) and s 12(2) and (3). Section 12(2) makes it an offence if a person has in his possession without authorisation a drug to I which Part IV applies. Section 11(1) applies Part IV to the dangerous drugs listed in Parts III, IV and V of the First Schedule to the Act. Heroin is listed in Part III of the First Schedule.

[69] The punishment for being in possession of heroin without authorisation is a fine not exceeding one hundred thousand ringgit or imprisonment not exceeding five years. **A**

[70] The provisions of s 6 of the Extradition Act on dual criminality have been clearly satisfied. **B**

[71] The only issue however is the specific absence of offences relating to possession of narcotics in the list of extradition offences in the Treaty embodied in the Thailand Order. **C**

[72] The appellants pointed us in the direction of the final paragraph in article II of the Treaty in the Thailand Order which provides as follows:

> Extradition may also be granted at the discretion of the State applied to in respect of any other crime for which, according to the law of both the Contracting Parties for the time being in force, the grant can be made. **D**

[73] As can be seen from the above discussion, the narcotic offence with which the appellant is charged is an extradition offence under s 6 of our Extradition Act. The only question is whether the offence is also an extraditable offence under the Thai law. **E**

[74] In our view, as the discretion lies with state to which the extradition request is made as to whether to grant extradition for an offence not listed in article II, it is that state which is in the best position to determine if the grant can be made. **F**

[75] In the case before us, the request had been made to Malaysia but the Minister had yet to make his order for extradition at the point in time that the application for habeas corpus was made by the respondent. **G**

[76] However, the fact that the request was being processed by the Malaysian Government in accordance with the Thailand Order and the Extradition Act is prima facie evidence of the government's satisfaction that the grant could be made. **H**

[77] What remains certain is that an extradition order can certainly be made based on the nine forgery charges. **I**

A CONCLUSION

[78] Based on the above reasons, we allowed this appeal.

Appeal allowed.

B

Reported by Ashok Kumar

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